

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S BRIEF
AND
APPENDIX**

77-6018

United States Court of Appeals
FOR THE SECOND CIRCUIT

NO LAND COLES,

Plaintiff-Appellant,

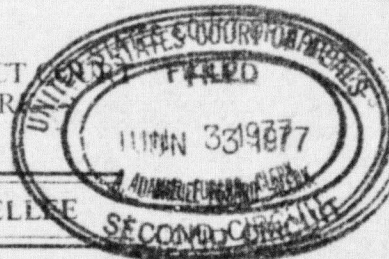
-against-

SUNSHINE BISCUITS, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF NEW YORK

BRIEF AND APPENDIX OF DEFENDANT-APPELLEE



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STATEMENT OF ISSUE

The sole issue presented on this appeal is whether an employee who is validly terminated by a private employer for cause, subsequent to enlistment in a delayed entry program, but three months prior to reporting for active service, is entitled to back pay from that employer for failure to reemploy pursuant to 38 U.S.C. Sections 2022 and 2024, the Veteran's Reemployment Rights Act.

STATEMENT OF THE CASE

A. Nature of the Case

This is an appeal from two orders, the first granting the motion for summary judgment of defendant, Sunshine Biscuits, Inc. ("Sunshine") and the second denying plaintiff Coles' motion to vacate and alter the judgment. (The Memorandums and Orders of Judge Dooling are annexed hereto in the Appendix). Plaintiff Coles, an employee of Sunshine, enlisted in the Marine Corps on or about October 21, 1974 but did not commence active duty until January 24, 1975. The United States District Court for the Eastern District of New York, the Honorable John F. Dooling presiding, held as a matter of law that, under the veteran's reemployment provision, Coles' right to reemployment was controlled by his employment status at the time he entered active service and not at the time of enlistment under the delay program (A-12). Since Coles was discharged in October 1974 and did not enter active service until January 1975, the court granted Sunshine's motion for summary judgment. The court, in ruling on Coles' motion to vacate and alter the judgment, held that, even if Coles left his employment sometime in late October to join the armed forces with active duty to commence in late January, such conduct does not

constitute leaving a position in order to perform military training and service (A-16).

B. The Proceedings Below

This action was instituted on July 23, 1976 in the United States District Court for the Eastern District of New York. Coles was represented by the United States Attorney for the Eastern District. By notice of motion dated November 4, 1976, Sunshine moved for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure on the ground that Sunshine was entitled to judgment as a matter of law because Coles was validly discharged for cause three months before he entered military training and service. Sunshine supported this motion with the affidavits of two employees and numerous documentary exhibits from Sunshine's personnel files, as well as with a memorandum of law. Coles, by his counsel, submitted a counter-statement and memorandum in opposition. The court on December 13, 1976 granted Sunshine summary judgment and dismissed the complaint.

By notice of motion dated December 27, 1976, Coles moved for vacation and alteration of the judgment pursuant to Rules 59(e) and 60(b)(6). This motion was supported by affidavits of the Assistant United States Attorney and

of Coles himself.* Oral argument on the motion was heard on January 14, 1977 and, by memorandum and order dated January 18, 1977, the court denied the motion to vacate and alter the judgment.

Notices of appeal were filed. After a scheduling order issued, the Assistant United States Attorney sought an amended civil appeal scheduling order to allow the United States Departments of Labor and Justice to determine whether the United States Attorney would continue as counsel on appeal. On March 25, 1977, the Assistant United States Attorney moved in this Court to be relieved as counsel on the ground that he had been advised that the Solicitor General had decided not to prosecute the appeal. Coles is proceeding pro se on this appeal.

C. Facts

This action concerns the employment status of Coles on entering military service and the extent of any employment right based on that status. The material facts are simple. Nineteen year old Coles was employed by Sunshine

* Sunshine opposed this motion on two grounds: (1) that the motion was not timely and (2) that the motion did not present any issues cognizable on such a motion but rather was an improper attempt to relitigate the summary judgment. The court did not treat the motion strictly as one to vacate and alter but rather the court reconsidered summary judgment.

from July 10, 1974 until October 29, 1974. During this three month period, his work record was characterized by absenteeism and tardiness problems as well as below-caliber performance. These problems resulted in various shift changes and assignment changes as well as conferences with supervisors including one meeting at which Coles was accompanied by the union steward. At this latter meeting on September 13, 1974, Coles was told he would be dismissed if these work problems continued. On or about October 21, 1974, Coles enlisted in the Marine Corps and was told to report for active duty in January 1975. On October 23, 1974, Coles was suspended for three days for unexcused absenteeism. He was directed to report to work again on October 28, 1974 or face further suspension or dismissal. When he failed to report, Sunshine sent him a termination telegram. On January 24, 1975, Coles reported for active duty. On February 27, 1975, one month after entering active service, he was discharged.

In early March 1975, Coles contacted Sunshine regarding reemployment. He was told that he was not entitled to reemployment because he had been terminated for cause and without regard to or knowledge of his military status. Thereafter, Sunshine was contacted by the United States Department of Labor on Coles' behalf. Negotiations between Sunshine and the Department of Labor took place. Eventually, in early September 1975, Coles produced his

honorable discharge certificate. At that time, under pressure from the Department of Labor and in an effort to amicably resolve a time-consuming situation and to avoid litigation, Sunshine hired Coles once again. His chronic work problems reappeared. Coles resigned in early December 1975 to take another job. In July 1976, he brought this action for back pay for the period from March 3, 1975 through September 10, 1975.

ARGUMENT

Summary

Coles seeks back pay, arguing that because he was discharged after enlistment but before commencing active duty, some three months later, he was entitled to reemployment with Sunshine following a one month tour of active service. The court below properly found as a matter of law that this argument fails. It is not enlistment which gives rise to reemployment rights but rather the entry into active service.

Summary judgment was properly granted because there were no material factual disputes raised in either motion. The critical fact is that when Coles entered active military status in late January 1975 any employment status he had with Sunshine was that of a previously terminated employee discharged for cause. Coles argues that Sunshine's conduct in hiring him in September 1975 somehow gives rise to a right to back pay. Sunshine's conduct cannot be viewed as an admission of liability where Sunshine, by hiring Coles, attempted to resolve an undesirably protracted situation in an amicable manner rather than offend the Department of Labor.

THE VETERAN'S REEMPLOYMENT
RIGHTS ACT ENTITLES AN
EMPLOYEE TO REEMPLOYMENT
ONLY WHEN THAT EMPLOYEE
LEFT A POSITION FOR IMMIN-
ENT ACTIVE SERVICE

The Veteran's Reemployment Rights Act, 38 U.S.C.A. Section 2021(a) (1971), entitles an individual who is drafted to reemployment. The statutory language grants this right to "any person who is inducted . . . for training and service and who leaves a position . . . in the employ of any employer to perform such training and service."

Section 2024(a) grants the same reemployment rights and benefits to persons who enlist in the Armed Forces of the United States. The statutory scheme clearly indicates, by the use of the criteria "training and service" that reemployment rights are not triggered by mere enlistment or induction. Coles has never contended that he left Sunshine to engage in training and service, and the court below properly found as a matter of law that leaving a position with the expectation of reporting for training and service three months later is insufficient to bring an individual within the scope of the veteran's reemployment statute (A-16).

* All emphasis supplied unless otherwise indicated.

The leading case, McCarthy v. M&M Transportation Co., 160 F.2d 322 (1st Cir. 1947), supports the decision of the court below.

The McCarthy court was faced with the same issue which this Court must consider -- "whether or not the petitioner in order to perform training and service, left his position with the respondent" 160 F.2d at 323.* McCarthy was a truck driver for M&M and also served as shop steward. In August 1943, McCarthy was notified that his induction would take place on September 3, 1943. At the time of induction McCarthy at his own request was placed on inactive duty with orders to report at a later date for active duty, just as Coles enlisted to enter active duty at a later date. McCarthy worked on 3 or 4 days after his induction, while Coles worked on one or two days after his induction. McCarthy was then fired and failed to submit the question of the justification of his discharge to arbitration. Thus the validity of the discharge was not an issue in the litigation. Similarly, here there is no contention that Coles

* The statutory language has been amended but the change in language is of no effect. The McCarthy court determined the meaning of "in the case of any such person who, in order to perform such training or service, has left or leaves a position. . . ."

was discharged for any reason other than poor attendance and poor performance.

The First Circuit found the statute to be clear and unambiguous, leaving the crucial question "whether or not the petitioner left his position in order to perform his training or service" 160 F.2d at 324. The court sketched several fact patterns which would give rise to reemployment rights, but found that mere induction on inactive status, followed by continued status as an employee, followed by discharge unrelated to military status, followed by active duty, did not give rise to such rights (160 F.2d at 324):

" . . . petitioner has failed to prove that he left his job at any time in order to perform training or service. . . . [T]his result accords with the policy of the statute which was intended to return a veteran to the status quo existing prior to his military career. This veteran's status was only that of a discharged employee of respondent. To order reinstatement in such a case would be to say that the Act was intended to give a veteran greater rights in this respect than he would have had had he not gone into service."

Coles' claim fails because, like McCarthy, his lawful termination during the period between enlistment and entry into active service places him outside the clear terms of the statute.

Sunshine has discovered no case which questions the validity of the McCarthy holding, and, while this Court has not considered this precise issue, the meaning of leav-

ing a position in order to perform service and training, this Court in Kelly v. Ford Instrument Co., 298 F.2d 399 (2d Cir. 1962), held that the purpose of the veteran's re-employment provisions is "to preserve to the employee who entered service the employment benefits of his contract with his employer, so that he might return without loss of seniority, status or pay because of his military service." 298 F.2d at 404.*

McCarthy has been followed by every court faced with the issue of the point at which veteran reemployment rights become effective. Its continued vitality is evidenced by the analysis of the court in O'Grady v. United States Steel Corp., 78 CCH Labor Cases ¶ 11,304 (U.S.D.C., N.D. Ill. 1973). O'Grady is the most recent case to consider the reemployment rights of a person who is permanently released from employment during the interval between enlistment and entry into active duty. The court indicates that sum-

* Kelly concerned the reemployment right of an employee who had been "laid off" prior to entry into the service. The court held that Kelly had a reemployment right because even though "laid off" he retained a right to be rehired under applicable collective bargaining agreement provisions. See also Barbee v. Capital Airlines Inc., 191 F.2d 507 (D.C. Cir. 1951), and Edwards v. Capital Airlines Inc., 176 F.2d 755 (D.C. Cir. 1949), where absent such a provision in the collective bargaining agreements, "lay-off" prior to entry into active duty was held to terminate employment, precluding recovery of back pay or reinstatement pursuant to the reemployment provisions. See also Dyer v. Holston Manufacturing Co., 237 F. Supp. 287 (E.D. Tenn. 1964).

mary judgment for the employer in these circumstances is precluded only by an allegation that the employee was terminated solely because he had enlisted. Plaintiff Coles has not raised this issue.

The Sixth Circuit followed McCarthy in Congregation of Brothers of St. Francis Xavier v. Grone, 164 F.2d 689 (6th Cir. 1947), reversing the lower court decision requiring reinstatement. Grone was a football coach who was called into active service after the expiration of a two year contract and before a renewal contract was entered into. The court held that he was not entitled to reinstatement even though Grone had received notice to report for duty during the existence of the contract. The termination of Grone's employment during the interval between his receipt of the notice to report and his entry into active duty was controlling, leaving him without reemployment rights.

CONCLUSION

This Court should affirm the order of the court below because, as a matter of law, Coles is not entitled to back pay.

Dated: June 3, 1977

Respectfully submitted,
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APPENDIX

DEC 18 1975
E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
NOLAND COLES,

:
Plaintiff,

-against-

:
SUNSHINE BISCUITS, INC.,

:
Defendant.:
-----X

76 C 1376
MEMORANDUM
and
ORDER

Appearances:

LEWIS F. TESSER, Esq. (DAVID G. TRAGER, Esq.,
United States Attorney, of Counsel) for plaintiff

PAUL G. PENNOYER, JR., and PAUL J. OSTLING, Esq.
(Messrs. CHADBOURNE, PARK, WHITESIDE & WOLFF,
of Counsel) for defendant

DOOLING, D.J.

Plaintiff served one month and three days in the United States Marine Corps, from January 24 until February 27, 1975. He had been employed by defendant before he enlisted in the Marine Corps and he sought reinstatement with defendant on March 3, 1975. Ultimately defendant re-employed plaintiff for the period September 10, 1975, until December 1, 1975; plaintiff then left defendant's employ voluntarily to take another job.

Plaintiff sues as one who, after entering defendant's employment, enlisted in the Armed Forces of the United States,

who was released from service under honorable conditions and who was denied the reemployment rights to which he was entitled [38 U.S.C. 2024(a), 50 U.S.C. App. 459(g)(1)]. The right relied upon is that conferred by 38 U.S.C. 2021(a)(B) [50 U.S.C. App. 459(b)(B)] :

"In the case of any person who is inducted ... and who leaves a position (other than a temporary position) in the employ of any employer in order to perform ... training and service, and (1) receives a certificate ... (relating to the satisfactory completion of military service) and (2) makes application for reemployment within ninety days after such person is relieved from such training or service ...

* * *

"(B) if such position was in the employ of ... a private employer, such person shall -

"(i) if still qualified to perform the duties of such position, be restored by such employer ... to such position

* * *

unless the employer's circumstances have so changed as to make it impossible or unreasonable to do so."

Defendant's basic position is that plaintiff was discharged for cause before he entered upon military training and service, that his September 1975 reinstatement was not a

recognition of entitlement to reinstatement but a compromise of a controversy, and that, in any case, plaintiff so long delayed assertion of his rights that he has lost any rights he might have had through laches. Defendant has moved for summary judgment.

Defendant's affidavits show:

Plaintiff, then nineteen years old, applied to defendant for work on July 10, 1974, and went to work on July 11th. He worked as a Sanitation employee, first under the supervision of Dennis Loalbo, and, later, under the supervision of Joseph Dangler. Dangler had retired from the United States Marine Corps as an officer, having worked his way to a commission from the enlisted ranks. Plaintiff had a poor employment experience. He had six absences from work commencing August 20th and preceding October 21, 1974. Two of the absences were unexcused, three were for sickness, and one was for "personal" reasons. (All of the sickness absences were on Friday and Monday.) Plaintiff also was late for work on a number of occasions, and was transferred from the morning shift to an afternoon position in the week of September 21st in order to make his commutation to work easier. There was also dissatisfaction with plaintiff's work, and his work

assignment was changed. At a conference between plaintiff, his supervisor Loalbo and a Union steward on September 13, 1974, plaintiff "was spoken to about his work & about his caliber of work being below standard." Plaintiff was told that he would "be dismissed if these problems arise again."

Some time before October 23rd plaintiff spoke to Dangler about the Marine Corps at least in general terms. Dangler does not recall plaintiff's expressing an intention to join the Corps, but he does recall telling plaintiff "that in light of his poor work record with Sunshine, he particularly would never make it as a Marine": that recollection suggests that plaintiff may have raised the question of his joining the Corps with Dangler.

Plaintiff worked a full day on October 21, 1974, on the afternoon shift. He did not work on October 22nd, and defendant's absentee Calendar records October 22nd as a day of unexcused absence. On October 23rd Dangler wrote a conference memorandum reading -

"This man has been previously warned about tardiness for work and work habits. Since the 10th of October he has been absent 3 days. He was taken off of the cafeteria clean up due to this absence plus he failed to do his complete job each night and the cafeteria area was not cleaned properly.

This man is suspended for three days starting 23 Oct. to 25 Oct. 1974. He is to report to work on the 3rd shift at 10:30 P M 28 October 1974. Failure to do so could result in further suspension or dismissal."

Plaintiff was at defendant's plant on October 23rd, but Dangler states that he then suspended plaintiff and sent him home with instructions to report for work on October 28th or face dismissal. Plaintiff did not report for work on October 28th, and on the following day Dangler prepared an "Employee Conference Record" addressed to plaintiff in these words -

"You were suspended for three days and instructed to report to work at 10:30 P M 28 October 1974. You failed to report for work. You are fired.

"Personnel (Please notify this man by telegram he is fired.)"

Dangler also sent to the payroll and personnel departments a "Separation Notice" setting forth October 21st as the last day that plaintiff worked and the reason for dismissal as

"Failure to report to work after suspension for absentism."

On the line in the form reading, "Recommend for Rehire"

Dangler checked the response "No." A confirmatory Western Union Mailgram was sent to plaintiff, at the address that he

had furnished to defendant on September 2d, reading:

"FAILURE TO REPORT TO WORK AFTER
SUSPENSION HAS RESULTED IN TERMIN-
ATION. YOUR SERVICES ARE NO LONGER
REQUIRED"

Plaintiff had meanwhile, apparently on October 21st or 22nd, enlisted in the United States Marine Corps in the "delay program." Plaintiff's Report of Separation from Active Duty records one month and four days of active service commencing January 24, 1975, and three months and two days of prior inactive service.

After his discharge from the Corps on February 27, plaintiff applied to defendant on March 3, 1975, for re-employment. The personnel manager's note of the meeting reads:

"File - N. Coles
"Stopped in to get his job back.
"I stated he was not entitled to
his old job because he was termin-
ated before he went into service.
Also, the company had no knowledge
of his having to go into the service."

The personnel manager states that plaintiff did not then produce a certificate, but he did have such a certificate, and his failure to produce it is explicable in light of the position that defendant took.

By letter of July 24 and interview of August 13, 1975, the Department of Labor interceded on plaintiff's behalf without avail. On September 10, 1975, plaintiff presented the appropriate statutory certificate and was reemployed with seniority dating to his original hiring. If the subject of back-pay came up, no promise of it was made. In the re-employment period plaintiff was absent from work on sixteen days. On October 27th, his absences were discussed with plaintiff and Loalbo's note of the conference reads:

"To date you have 7 days absent. If this practice continues you will be suspended for absenteeism.
"Please work to improve your record."

Eight additional absences followed, and on December 2, 1975, plaintiff, who had been absent on the preceding day, advised the personnel manager that he was terminating his employment with defendant. Before leaving he raised a question about back pay.

The present suit seeks only back pay from March 3, 1975, to September 10, 1975.

Plaintiff has not furnished to the United States Attorney or to the court any affidavit supporting his contentions on the facts. Rule 56(e) is explicit that when a motion for summary judgment is made and supported as provided in the rule -

and the present motion is - then

"... an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial."

To meet the motion on the facts plaintiff must present affidavits made on personal knowledge, and setting forth facts that would be admissible in evidence and to which the affiant is competent to testify.

Plaintiff suggests that he told his employer that he was enlisting. No affidavit to that effect is produced, the defendant's employees deny it, and every circumstance of the October events supports the affidavits of the defendant's employees. It is not possible to accept that plaintiff would not have responded to the dismissal Mailgram if he believed he had been discharged because he enlisted or for no just cause. Nor is there a basis on which it could be inferred that defendant's record of dealings with plaintiff through October 30th is a fiction. Plaintiff's unsworn assertions that his absences and latenesses were excusable can not be accepted as against his employment record and the affidavits

of men who worked with him in supervisory roles. Further, the unsworn assertion that plaintiff went to defendant's plant on October 23rd to discuss his military status, and not simply to report for work after a day of unexcused absence, must be rejected. Again plaintiff's employment record, the affidavits of Dangler and La Due, and the inferences arising from the circumstances preclude acceptance of plaintiff's assertion. And, finally, the assertion that plaintiff was discharged because he did not return to work after he enlisted is refuted by the record. He has been shown to have been dismissed for unexcused absence and a failure to return to work when directed. There is no evidence that his enlistment prevented plaintiff's returning to his job, or that he thought it did. In fact he worked October 21st.

The critical and dispositive question is simply whether the fact that plaintiff enlisted before he was discharged protects him in his reemployment rights. Defendant's contention in substance is that if defendant terminated plaintiff's employment before plaintiff entered upon active service, plaintiff had no reemployment rights - at least if the dismissal was for job-related reasons and took place in ignorance

of plaintiff's enlistment.

Section 2024 entitles the enlisted man to the same re-employment right granted by Section 2021 to the man inducted into service under the Military Selective Service Act. That right arises when the inductee "leaves a position ... in order to perform [military] training and service." It appears to be agreed that where an employee is inducted and after induction continues at work until called for active service, a lawful termination of employment between the two dates for job-related reasons results in a loss of reemployment rights. That is the agreed meaning of the leading case of McCarthy v. M & M Transportation Co., 1st Cir. 1947, 160 F.2d 322. The statutory purpose is seen as the preservation to the veteran of the employment rights he had and only those, not to reward enlistment by creating a right to regain a job that had already been lost (as in McCarthy), or a job that had ceased to exist (as in Dyer v. Holston Mfg. Co., E.D.Tenn. 1964, 237 F.Supp. 287), or a job to which the inductee had no equitable entitlement (as in Greathouse v. Babcock & Wilcox Co., N.D. Ohio, 1974, 381 F.Supp. 156). Had plaintiff in fact been called from his job to enter upon active service, his failure to give advance notice of his military status might not have

mattered (Fortenberry v. Owen Bros. Packing Co., S.D. Miss. 1966, 267 F.Supp. 605, 607, aff'd sub nom. Owen Bros. Packing Co. v. Fortenberry, 5th Cir. 1967, 378 F.2d 373). But where, as here, the employment, for reasons unrelated to plaintiff's enlistment, was terminated before plaintiff commenced his active service, the statute gives him no reemployment rights. Kelly v. Ford Instrument Co., 2d Cir. 1962, 298 F.2d 399, 404, had no occasion to apply it but clearly recognized the validity of the principle first explicitly stated in McCarthy.

The uncontroverted evidence requires rejection of plaintiff's assertion that he did not leave his position except to enlist and go on active duty. His employment was terminated before plaintiff went on active duty for reasons unrelated to plaintiff's enlistment. The question of good faith decided in the employer's favor in Alvado v. General Motors Corp., 2d Cir. 1962, 303 F.2d 718, is not even raised in the present case for the uncontradicted evidence requires the conclusion that defendant was not aware of plaintiff's enlistment. To say that plaintiff left his position to enlist is to speak without support in the evidence, and, moreover, it assumes the invalid premise that simply enlisting under

the delay program (like induction with a deferred action service date) amounts to leaving a position in order to perform military training and service. The critical date is the date when the employee leaves his position to enter upon active service, not his date of enlistment or induction.

It is not necessary to decide whether plaintiff was or was not qualified for reemployment. He was not/qualified in the gross sense of being physically disabled. The question of his qualification for reemployment is to be distinguished from the issue on which he was discharged. A qualified man can so conduct himself that his discharge is justified. Nor is it necessary to decide whether laches is a defense to a purely monetary demand where no reinstatement is sought. Cf. Bell v. Aerodex, Inc., 5th Cir. 1973, 473 F.2d 869, 872; Teamsters Local Union 612 v. Helton, 5th Cir. 1969, 413 F.2d 1380, 1385; Hire v. E.I. Dupont DeNemours & Co., 6th Cir. 1963, 324 F.2d 546. Moreover, the addition of the last sentence to Section 2022, not found in Section 459(d), enacting that no state statute of limitations shall apply to any proceedings under the enactment, seems to be directed to overruling cases which barred statutory wage claims by applying state limitations statutes. Bell and Hire were such cases.

It is, accordingly,

ORDERED that defendant's motion for summary judgment is granted, and the Clerk is directed to enter judgment that plaintiff take nothing and that the action is dismissed on the merits, without costs.

Brooklyn, New York

December 13, 1976.

John H. ...
U. S. D. J.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----- X
NOLAND COLES,

Plaintiff,

-against-

SUNSHINE BISCUITS, INC.,

Defendant.
----- X

:

:

:

:

76 C 1376

MEMORANDUM

and

ORDER

The judgment dismissing plaintiff's action on the merits was entered on December 15, 1976. December 24th and 25th were legal holidays and December 26th was Sunday. Plaintiff's motion under Rules 59(e) and 60(b)(6) was not received by defendant's counsel until December 29th, and it was received in an envelope postmarked December 28 P M. However, the affidavit of service made by the Assistant United States Attorney states that the motion papers were deposited in the mail chute drop in the Courthouse on December 27, 1976, and the two supporting affidavits were sworn to on December 27th. It is concluded that the motion was timely as a motion under Rule 59(e) (see Rule 6(a)).

In the circumstances of this case, the motion for summary judgment is reconsidered and account is taken of plaintiff's affidavit and the material adduced by defendant from

plaintiff's file at the headquarters of the New York United States Marine Corps Recruiting Office. The new material leaves no doubt that plaintiff was at the enlistment station on October 17th and October 18th, and that he nevertheless went to work on his afternoon shift job on both days, and that his date of enlistment was October 22, 1974. Plaintiff states that he took the oath of enlistment in the early afternoon. On that day, plaintiff states, he was told to report for active duty on January 27, 1975. The report date was later advanced to January 24, 1975.

Plaintiff does not say in his affidavit that he went to the job on October 23rd, and he seems not to adopt the statement earlier made on his behalf that he did go to the job on October 23rd to explain his change of status (see affidavit of December 27, 1976, paragraph 7). He says that he mailed a notice (Exhibit A annexed to his affidavit) to Sunshine, presumably on October 23d, 1974, signed by a Marine Corps sergeant to the effect that plaintiff was "Taking A Leave Of Absence To Enlist In the UNITED STATES MARINE CORPS On 23 October 1974." Passing the staggering improbability that Exhibit A is authentic (see Malkowski affidavit of January 7, 1977 and Exhibit 4), the set of

facts that plaintiff now argues that he could support with evidence is that he took leave of absence to join the armed forces on October 23rd before he was terminated from his job. He says (affidavit of December 27, 1976, paragraph 9)

"I left my position with Sunshine upon my induction, although I did not expect to report for active duty until January 27, 1975, with the intent and purpose of winding up my personal affairs before entering active service."

But that is not enough to accrue the right of reemployment; it does not constitute leaving a position in the employ of an employer "in order to perform such training and service." Plaintiff had worked for Sunshine only a little over three months and he was not to enter upon the performance of his training and service for three months.* It follows that the motion to set the judgment aside may not be granted.

It is

ORDERED that plaintiff's motion to alter and vacate the judgment entered December 15, 1976, is denied.

*It is not altogether clear that plaintiff did not enlist in the Marine Corps Reserve with a conditional right to enlist in the Corps. See Ostling affidavit of January 10, 1977, Exhibit 4. See 38 U.S.C. 2024(a). The enlistment contract was signed January 24, 1975.

Brooklyn, New York

January 18, 1977.

U. S. D. J.